

DEC 28 2007

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUBEN T. HERNANDEZ,

Plaintiff - Appellant,

v.

GARY PENROD; et al.,

Defendants - Appellees.

No. 05-56682

D.C. No. CV-04-00909-JFW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Submitted December 20, 2007^{**}

Before: GOODWIN, WALLACE, and HAWKINS, Circuit Judges.

California state prisoner Ruben T. Hernandez appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging denial of access to the courts. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

district court's dismissal for failure to state a claim pursuant to 28 U.S.C.

§ 1915(e), *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order), and we affirm.

The district court properly concluded that Hernandez's own pleadings showed the deadline for filing a petition for writ of certiorari in the United States Supreme Court had passed long before prison officials allegedly conspired to delay receipt of his legal mail. Accordingly, the district court properly dismissed Hernandez's claim for denial of access to courts. *See Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989) ("An 'actual injury' consists of some specific 'instance in which an inmate was actually denied access to the courts.'"); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (holding dismissal with prejudice is appropriate only when the complaint could not be saved by amendment).

Hernandez's remaining contentions are unpersuasive.

We deny Hernandez's request for judicial notice. *See Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000) (concluding that facts not relevant on appeal are not subject to judicial notice).

All pending motions are denied.

AFFIRMED.